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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFREDO HERNANDEZ,

Defendant and Appellant.

2d Crim. No. B209092
(Super. Ct. No. NA076346)
(Los Angeles County)

Alfredo Hernandez appeals the judgment entered after a jury convicted him on three counts of lewd conduct on a child under 14 (Pen. Code, § 288, subd. (a))¹ The trial court sentenced him to a total term of 12 years in state prison, consisting of the upper term of eight years plus consecutive two-year terms (one-third the midterm) on the two subordinate counts.

Hernandez was convicted of molesting his eight-year-old stepdaughter E.G. on three separate occasions over a four-month period. The first incident took place in June of 2007, while E.G.'s mother D.V. was in the hospital giving birth to Hernandez's son. E.G. was asleep in her bedroom when Hernandez awakened her and told her to massage him. E.G. followed Hernandez to the living room, where he laid down on the

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All further undesignated statutory references are to the Penal Code.

floor and told her "to massage his private part." When E.G. began massaging Hernandez's legs, "[h]e told me to go higher and higher until I reached the private part." Hernandez then pointed to his crotch and said "massage me right here." E.G. wanted to stop, so she started crying and said her arm was hurting. Hernandez told her "five more minutes." E.G. proceeded to move her hand in a circular motion until "his private part got wet." Hernandez got up, smiled at E.G., and told her to go to bed. E.G. did not immediately tell D.V. what had happened "[b]ecause he [Hernandez] said if I tell anyone, I'm going to get in trouble."

The second incident took place during a summer afternoon while D.V. was at Walmart with E.G.'s three youngest brothers. E.G. was helping her brother Carlos clean their room when Hernandez told her to come to his room. After E.G. followed Hernandez to his room, he lay down on the bed and told her to close the door. E.G. began massaging Hernandez's crotch on top of his pants and "noticed something sticking out." E.G. did not tell D.V. about the incident because she thought she would get in trouble. She did, however, tell her younger brother Eric.

The third incident took place on Halloween while D.V. and two of E.G.'s brothers were at a party. Once again, Hernandez lay on his bed and told E.G. to massage him. While E.G. was doing so, Hernandez grabbed her hand and told her she was doing it wrong. E.G. continued to massage Hernandez's "private part" until she "saw something wet."

The following day, E.G. told D.V. what had happened and D.V. took her to the police. After Hernandez was taken into custody, he claimed E.G. had started massaging his penis on two different occasions when she was supposed to be massaging his legs and feet. Both times, he told E.G. to stop after he got an erection. Hernandez wrote an apology letter to E.G. and D.V. asking for their forgiveness.

D.V. acknowledged that she brought E.G. back to the police station in March of 2008 "[b]ecause she said she wasn't quite in agreement with what she had said." E.G. never said she had lied, however, and D.V. never told her to do so.

We appointed counsel to represent Hernandez in this appeal. After counsel's examination of the record, she filed an opening brief raising no issues.

On January 22, 2009, we advised Hernandez that he had 30 days within which to personally submit any contentions or issues that he wished to raise on appeal. Hernandez filed a timely response in which he challenges the court's reasons for imposing the upper term on count 1 and consecutive sentences on the two subordinate counts. He also argues that the abstract of judgment erroneously identifies his crimes as violent felonies, which renders them subject to the 15 percent worktime credit limitation under section 2933.1, subdivision (c), because "[t]here was no violence reported, exposed, [or] alleged in this case" Neither claim has merit.

The court sentenced Hernandez to the upper term on count 1 based on its finding that he violated a position of trust. (Cal. Rules of Court, rule 4.421(a)(11).) This single aggravating factor is sufficient to warrant imposition of the upper term. (*People v. Yim* (2007) 152 Cal.App.4th 366, 369.) A consecutive sentence was properly imposed on count 2 based on the court's finding that the victim was particularly vulnerable. (Cal. Rules of Court, rules 4.421(a)(3), 4.425(b); see *People v. Davis* (1995) 10 Cal.4th 463, 552 [recognizing that any one factor in aggravation is sufficient to support a consecutive sentence].)² While the record does not support the court's finding that Hernandez had not performed well on probation with regard to count 3, the court's decision to impose a consecutive term on that count (as well as the consecutive term on count 2) was properly based on its finding that all three crimes were committed on separate occasions. (Cal. Rules of Court, rule 4.425(a)(3).) Moreover, Hernandez's crimes are correctly identified as violent felonies. (§§ 667.5, subd. (c)(6), 2933.1, subd. (a).)

² Hernandez's erroneous belief that this factor "goes to the nature of the crime" is based on a misreading of the court's remarks. At the sentencing hearing, the prosecution offered as aggravating factors "the fact that [Hernandez] was in a position of trust, the child is particularly vulnerable in this case, and the nature of the charge, the sexual contact, as well as the crime itself." The court responded: "You can't use that as a factor in aggravation, the crime itself or the charge."

We have reviewed the entire record and are satisfied that Hernandez's attorney has fully complied with her responsibilities and that no arguable issue exists. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

The judgment is affirmed.

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PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

Joan Comparet-Cassani, Judge
Superior Court County of Los Angeles

Vanessa Place, under appointment by the Court of Appeal; Alfredo Hernandez, in pro. per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent.